

FCC Initiates Close Look at Wireless Infrastructure Deployment and Investment Issues

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At its April 20, 2017 Open Meeting, the Federal Communications Commission (“Commission” or “FCC”) initiated two proceedings to review ways in which the Commission might alleviate obstacles wireless providers face at the state, local, and Tribal levels when trying to install new or upgrade existing wireless infrastructure. FCC Chairman Ajit Pai welcomed new ideas for “updating state, local, and Tribal infrastructure review to meet the realities of the modern marketplace.” The Commission’s release, a combined [notice of proposed rulemaking \(“NPRM”\) and notice of inquiry \(“NOI”\)](#), explains that wireless providers need to be able to deploy many wireless cell sites across the country in response to growing demand for wireless broadband to support high-bandwidth applications and the growth of the Internet of Things.

The NPRM and NOI on wireless infrastructure deployment complement a second pair of proceedings that will be looking at wireline infrastructure, also adopted the FCC’s Open Meeting. A blog and advisory on the wireline counterpart is forthcoming.

Comments are due 30 days after publication in the Federal Register and reply comments are due 60 days after publication.

I. NPRM

A. Streamlining State and Local Review under Section 332(c)(7)

The FCC’s NPRM focuses on the process affecting wireless facility deployment applications that are conducted by State and local regulatory agencies, the subject of Section 332 of the Communications Act. Section 332(c)(7) states “[e]xcept as provided in this paragraph, nothing in this Act shall limit or affect the authority of a state or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.” Section 332 recognizes state and local authority over wireless facility siting review subject to limitations including a requirement that localities make decisions on applications within a reasonable period of time to limit impediments to wireless facilities deployment. The Spectrum Act, enacted in 2012, includes a provision to further streamline locality actions by removing the option to deny certain types of siting applications. The NPRM discusses the Spectrum Act rules as a comparison benchmark for possible updates to the Section 332 rules.

The Commission solicits comment on the effectiveness of the FCC’s efforts to date implementing Section 332 – principally a 90 or 150-day shot clock, depending on the circumstances, which creates

a presumption that a state or local government has failed to act within a reasonable period of time – and additional measures or clarifications that might further expedite Section 332 review processes. The FCC proposes:

- **Adoption of a Deemed Granted Remedy for Missing Shot Clock Deadlines**

In 2009, the FCC adopted a rule which created a rebuttable presumption that certain shot clock deadlines established by the Commission were reasonable. Thus, if a locality fails to act on an application by the applicable shot-clock deadline, the applicant could seek judicial review pursuant to Section 332, and the locality would have the burden of rebutting the presumption that the time period in which they failed to respond was unreasonable. If the locality could not satisfy the burden, the court would issue an injunction approving the application. What the Commission did not do eight years ago was provide that applications were “deemed granted” if there was no action within the shot clock period. Since siting applications not related to the Spectrum Act, and thus not subject to automatic grant, are subject to judicial review when a locality fails to act on a siting application within a reasonable period of time, the need to pursue litigation remedies can lead to even more delay before a proposed antenna can finally be installed.

The Commission, mindful of these potential delays and their impact on the roll-out of wireless services, seeks comment on the propriety and method of implementing a “deemed granted” remedy when state and local agencies fail to satisfy their obligations under Section 332(c)(7)(B)(ii) to act on applications in a reasonable time. Among the principal elements of or underlying a prospective deemed granted rule are the following:

1. Change the current “rebuttable presumption” to an “irrebuttable presumption” that a locality’s failure to act on an application within a set period causes the application to be deemed granted without the need to seek judicial relief.
2. Narrowly interpret the phrase “except as provided” in Section 332(c)(7), which preserves state and local authority, such that if a locality fails to meet its obligation to act on a request within a reasonable time then its authority concerning that request lapses; where that authority lapses, the application would be deemed granted.
3. Adopt a specific “deemed granted” policy to implement Section 332(c)(7) using statutory authority provided by Sections 201(b) and 303(r) which generally authorize the Commission to adopt rules or issue orders to carry out substantive provisions of the Communications Act.

- **Length of Time for Localities to Act on Applications**

The FCC also seeks comment on whether it should adopt shorter time frames for review of facility deployments not covered by the Spectrum Act. Commission rules establishing the “rebuttable presumption” mentioned earlier currently afford localities 90 days to review and act on a collocation application and 150 days for other types of applications. The FCC rules implementing the Spectrum Act, however, provide a shorter, 60-day shot clock for action in the limited circumstances described in its provisions. The Commission seeks input on whether these timelines should be harmonized or whether some other time frame should be adopted for Section 332 applications.

- **Moratoria**

The NPRM identifies concerns about localities that impose “moratoria” on processing siting applications. The Commission previously, in the *2014 Infrastructure Order*, explained that the shot clock deadlines for applications continue to run despite any such moratorium being in place when an application is filed or adopted after such filing. The FCC asks commenters to provide information about whether localities are still imposing moratoria or other similar restrictions on processing siting applications. The Commission raises the possibility of issuing an order or adopting some other regulatory measure to provide more clarity on its rules as they relate to localities using moratoria that have the effect of suspending or slowing down wireless application processing.

B. Examination of Historic Preservation and Environmental Review Process

The National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) require federal agencies to assess the environmental effects of a proposed major federal action, such as projects and programs assisted, regulated or approved by federal agencies and agency rules and regulations, and take into account the effect of the issuance of any license on any historic property, respectively. To implement these two laws, the FCC has assumed responsibility for reviewing wireless communications facility construction as it relates to licensing and antenna structure registration. Under current FCC rules, an applicant must file an environmental assessment (EA) if its proposed construction meets any of the environmentally sensitive conditions outlined in the rules. Similarly, spectrum licensees must file an EA with the FCC if the proposed construction may affect historic properties.

Section 1.1307(a)(4) of the FCC’s rules direct licensees and applicants to follow procedures in the Advisory Council on Historic Preservation (ACHP)’s rules as modified by the Collocation NPA and the NPA, programmatic agreements governing the process. The NPA requires good faith efforts to identify and consult Tribal Nations or Native Hawaiian Organizations (NHO) to assess the cultural and religious significance to historic properties of an undertaking. This consultation is facilitated by the Tower Construction Notification System (TCNS), which automatically notifies Tribal Nations and NHOs of proposed constructions within geographic areas that they have confidentially identified as of relevance. The collocation NPA excludes certain antenna collocation projects on existing structures from NHPA review, with a few exceptions.

The NPRM explains that wireless providers will need additional flexibility to be able to strategically place distributed antenna systems (DAS) and small cell facilities throughout the country to provide higher quality connections in a timely fashion. Providers installing such facilities have claimed that the processes under NEPA and the NHPA are costly and cause significant delays to deployment. The Commission seeks to identify ways to improve the efficiency of these processes. The Commission notes that any changes to the rules implementing NEPA that it may adopt will require consultation with the Council for Environmental Quality, a division of the White House that coordinates federal environmental efforts. Similarly, any changes to the programmatic agreements governing the NHPA review that the FCC might decide to make will require the agreement of the ACHP and the National Conference of State Historic Preservation Officers (SHPO).

Commenters are asked to provide information on the financial and time costs as well benefits of the review process under NEPA and the NHPA, including costs and benefits related to Tribal involvement in historic preservation review. The Commission also asks about costs and benefits of complying with FCC rules implementing NEPA and the NHPA; costs for review of the proposed construction of a typical small facility deployment compared with those for tower construction projects under NEPA and/or SHPO review; and whether SHPO review duplicates historic preservation review done at the

local level.

The FCC further seeks comment on a number of miscellaneous issues related to the review process under NEPA and NHPA including:

- fees paid to Tribal Nations in the NHPA review process and how the practices for Tribal consultation under the FCC compare with those of other federal agencies;
- ways to accelerate review processes including adopting shorter time limits for response from SHPOs, Tribal Nations, and/or NHOs to different categories of proposed construction;
- revisions to the *2005 Declaratory Ruling* and Good Faith Protocol processes – allow applicants to commence construction if there is no timely response to a TCNS notification or if there is no follow-up communication from a Tribe or NHO – in a manner that would permit applicants to self-certify compliance with NHPA process and begin construction once they meet notification requirements;
- possible adoption of a voluntary or mandatory process to allow the submission of applications to SHPOs and through the TCNS in batches similar to what was done for facilities associated with building out the positive train control railroad safety system;
- potential new categorical exclusions for small cells and DAS facilities for NEPA;
- prospective expansion of the circumstances under which pole replacements, construction of wireless facilities in rights of way; and collocations of wireless antennas should be excluded from review under the NHPA; and
- The FCC’s interpretation of its responsibility to review the effects of wireless facility construction under the NHPA and NEPA including 1) whether it is still necessary for the FCC to retain a limited approval authority over facility construction to ensure environmental compliance; and 2) the extent of the Commission’s responsibility for considering the effects of construction associated with the provision of licensed services under existing regulations and judicial precedent.

II. NOI

In the NOI, the Commission focuses on Sections 253 and 332(c)(7) of the Act. Section 253 states that “[n]o State or local statute regulation or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Section 332(c)(7), quoted in the NPRM, preserves the authority of State and local entities to make decisions about antenna facilities in their communities but imposes certain constraints and require action in a reasonable time. The NPRM states that these two statutory provisions were intended to balance the desire to streamline regulations that could slow down the deployment of broadband facilities with the role of localities in retaining an appropriate measure of control over land use decisions.

The FCC explores the scope of each provision and how it should be interpreted in relation to the other to further the goal of facilitating wireless broadband deployment. Specifically, the item focuses on the following:

Intersection of Sections 253(a) and 332(c)(7) – In the Order, the Commission explains that

while both statutes ban state or local regulations that “prohibit or have the effect of prohibiting” service, each provides a different remedy. Section 253(a) requires the FCC to preempt a State or local government action that violates the clause. However, Section 332 provides for judicial remedies in response to a violation. The FCC seeks comment on whether the obligations of these provisions differ in otherwise similar situations.

Prohibit or Have the Effect of Prohibiting – The FCC notes that courts have interpreted the phrase “prohibit or have the effect of prohibiting” in multiple ways despite the Commission’s reading of this language in both statutes as having a similar effect. The FCC has interpreted Section 253(a) to proscribe state or local legal requirements that prevent all but one entity from providing telecommunications service in a particular state or locality; and Section 332(c)(7) is understood to mean that a state or local decision to deny a siting application because one or more carriers are already providing wireless service in the area has the effect of “prohibiting the provision of wireless service. The FCC seeks comment on the proper interpretation of this phrase and whether the Commission should provide further guidance on how to apply and interpret this language under each section of the Act.

“Regulations” and “Other Legal Requirements” – Section 253(a) specifies that a “statute,” “regulation” or “other legal requirement” may be preempted while Section 332(c)(7) refers to limits on “decisions” concerning wireless facility siting and the “regulation” of siting. The FCC asks how these terms should be interpreted and whether they can be viewed as having essentially the same meaning. The NPRM also asks about the extent to which these provisions apply to states and localities acting in a proprietary manner, such as a landlord for municipal property, versus a regulatory capacity, and what would constitute a proprietary capacity if this is a distinction that matters.

Unreasonable Discrimination – The Commission seeks input on whether certain criteria that some localities employ when reviewing wireless siting applications could be deemed a violation of Sections 253, 332(c)(7) or another provision of the Act that prohibits discriminatory state or local government actions even if on their face they seem to be neutral. For example, the FCC seeks input on whether there are localities that have requirements for telecom-related deployment applications that are more burdensome than the requirements for non-telecom deployments that have the same or similar impact on land use.

The NPRM and NOI will be the start of what is likely to be an ongoing effort by the Commission to promote broadband deployment and remove unnecessary regulatory obstacles. For further information, please contact your Kelley Drye attorney or any other member of the firm’s

[Communications Practice Group](#).